

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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Amendment to the Commission's Rules)
To Permit Flexible Service Offerings) WT Docket No. 96-6
in the Commercial Mobile Radio Services)

To: The Commission

REPLY COMMENTS OF BELLSOUTH

BellSouth Corporation ("BellSouth"), by its attorneys, hereby replies to the comments of Cellular Mobile Systems of St. Cloud General Partnership, LLP ("St. Cloud") submitted in response to Public Notice, DA 97-203 (Sept. 27, 1997). Specifically, BellSouth disputes St. Cloud's claim that Section 22.323, which imposes conditions on the provision of incidental fixed services over cellular frequencies, must be retained.¹

In its *First Report and Order* in the captioned proceeding, the Commission determined that CMRS licensees should have the flexibility "to provide exclusively fixed services, exclusively mobile services, *or any combination of the two*."² As BellSouth demonstrated in its petition, the Commission made this determination because:

¹ See Cellular Mobile Systems of St. Cloud General Partnership, LLP Comments, WT Docket No. 96-6 (Nov. 12, 1997) ("Opposition"). The other parties filing comments in the proceeding supported BellSouth's position that Section 22.323 should be eliminated. See AT&T Wireless Service, Inc. Comments, WT Docket No. 96-6 (Nov. 12, 1997); CTIA Comments, WT Docket No. 96-6 (Nov. 12, 1997); GTE Service Corporation Comments, WT Docket No. 96-6 (Nov. 12, 1997).

² *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8965, 8977 (1996) ("First Report").

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The limitations in our rules governing the provision of fixed services on PCS and other CMRS spectrum have caused uncertainty among carriers. Although terms such as “ancillary,” “auxiliary,” and “*incidental*” are intended to provide licensees who offer CMRS services with flexibility, these terms are not defined in the rules and have been subject to varying interpretations. As a result of this lack of clarity, we have found that carriers are hesitant to take advantage of the flexibility allowed by the current rules to explore potential flexible uses of their spectrum without further guidance from the Commission.³

The Commission also stated that it was giving CMRS licensees “maximum flexibility” to offer fixed services over CMRS frequencies.⁴ Thus, because of the uncertainty created by the ancillary, auxiliary, and incidental limitation contained in its CMRS rules, the Commission eliminated all limitations on the provision of fixed services.

In light of the foregoing, St. Cloud’s argument that Section 22.323 was intentionally retained is illogical.⁵ It makes no sense to permit a CMRS licensee to provide fixed services exclusively, *without restriction*, but require these same licensees to meet the burdensome regulatory filing requirements associated with Section 22.323 before they can provide fixed cellular services on an incidental basis. Moreover, the *First Report* was adopted to eliminate the uncertainty surrounding the definitions of incidental, ancillary, and auxiliary. If Section 22.323 was retained, cellular carriers still would be faced with the uncertainty the *First Report* intended to eliminate. Cellular providers would be required to determine what constitutes “incidental” service in order to ascertain whether Section 22.323 is triggered — and there would inevitably be litigation about whether a particular service is incidental (and subject to the Section 22.323 restrictions).

³ *First Report*, 11 F.C.C.R. at 8970; BellSouth Petition at 1-2.

⁴ *First Report*, 11 F.C.C.R. at 8975.

⁵ Opposition at 2-3.

The crux of St. Cloud's argument is that Section 22.323 creates a "safe harbor" for cellular providers — any services provided pursuant to this section would be regulated as CMRS.⁶ BellSouth agrees with St. Cloud that such services are properly regulated as CMRS, but disagrees with the proposition that Section 22.323 is necessary to ensure CMRS regulation.

According to the Commission:

we emphasize at the outset that our decision to allow carriers to offer co-primary fixed services on spectrum allocated for CMRS *does not alter in any way our regulatory treatment of fixed services that have been provided by CMRS providers under our prior rules. In the CMRS Second Report and Order, we stated that ancillary, auxiliary, and incidental services offered by CMRS providers fall within the statutory definition of mobile service and are subject to CMRS regulation. We affirm that determination here.* In our order today, however, we have broadened the scope of fixed services that may be offered by CMRS providers. We therefore seek further comment on the regulatory treatment of such fixed services *that may not be considered ancillary, auxiliary or incidental to mobile service.*⁷

Even if Section 22.323 were eliminated, fixed services offered on a similar limited basis via cellular frequencies will be regulated as CMRS. While the regulatory treatment of fixed services on a more widespread basis is currently being considered by the Commission, the elimination of Section 22.323 will not affect the ultimate determination of how such services are regulated — the nature of the service itself and the Section 332 criteria will be the determining factors.


⁶ Opposition at 4-5.

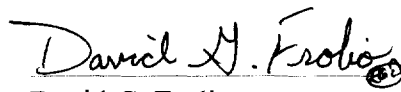
⁷ First Report, 11 F.C.C.R. at 8985 (emphasis added).

For the aforementioned reasons, as well as those referenced in BellSouth's petition, the Commission should eliminate Section 22.323.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 
William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309-2641
(404) 249-4445

By: 
David G. Frolio
1133 21st Street, NW
Washington, DC 20036
(202) 463-4132

Its Attorneys

December 12, 1997

CERTIFICATE OF SERVICE

I, Crystal M. Clay, hereby certify that on this 12th day of December 1997, copies of the foregoing "Comments in Opposition" in WT Docket No. 96-6 were served by hand on the following:

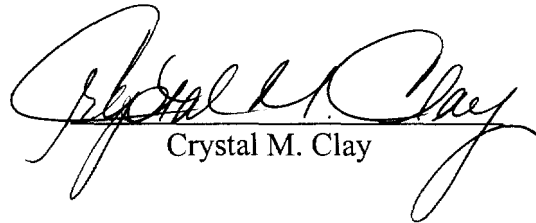
Caressa D. Bennet
Michael R. Bennet
1019 19th Street, NW, Suite 500
Washington, DC 20036

Cathleen A. Massey
Douglas I. Brandon
1150 Connecticut Ave., NW, Suite 400
Washington, DC 20036

Howard J. Symons
Sara F. Seidman
Michelle M. Mundt
701 Pennsylvania Ave., NW, Suite 900
Washington, DC 20004

Andre J. Lachance
1850 M Street, NW, Suite 1200
Washington, DC 20036

Michael F. Altschul
Randall S. Coleman
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036



Crystal M. Clay